F. M. S.

[ORIGINAL CIVIL JURISDICTION]

HEREFORD, J.
January 11, 1934.

WOON FOON HOH ..... Plaintiff.

v.

P. L. M. MUTTHIAH CHETTY.....Defendant.

[NEGRI SEMBILAN CIVIL SUIT No. 111 of 1933]

Land Code 1926, s.137—Entry into possession by chargee—Duty of chargee to give reasonable notice or to take over property as a going concern —Liability to account as a mortgagee in possession—Liability for waste.

A chargee entering into possession under the Land Code section 137 by reason of the chargor's default in maintenance or cultivation of the property charged must either give the chargor sufficient notice to enable him to wind up the concern without unreasonable loss or himself take it over as a going concern.

The chargee on such occasions takes on himself the responsibilities of a mortgagee in possession under English law and will be held strictly accountable for any acts of waste and for all rents and profits actually received or which but for his default might have been received.

F. A. Wright for plaintiff.

E. Joseph for defendant.

HEREFORD, J.—In this case the Plaintiff is the registered proprietor and chargor of certain land in Johol in the district of Kuala Pilah held under Grant 8647 and the Defendant is the registered chargee.

In December, 1932 the Defendant, by virtue of the provisions of section 137 of the Land Code, obtained a certificate from the Collector that default had been made in the maintenance of the charged land and an authority from the Registrar of Titles to enter into possession and receive the profits of the charged land. The Defendant took no action on this authority until the 25th of May, 1933, when he appears to have proceeded to the land accompanied by 4 or 5 other persons amongst whom was a Police Constable, and directed the Plaintiff to leave the premises. This the Plaintiff and his coolies proceeded to do on that day, and the Defendant appears to have left two watchmen in charge of the property. The property consists of a rubber estate, in area about 35 acres, the whole of which was in a tappable condition and the major portion of which, at any rate, was at that time being tapped by the Plaintiff. The Plaintiff states that on leaving the estate he came to Seremban and took legal advice, in consequence of which he returned with his coolies to the estate on a date which is variously given as some time between the 31st of May and the 3rd of June, 1933. The Plaintiff's coolies started tapping. The Plaintiff himself left the estate and does not seem ever to have returned to it. On the 3rd of June, 1933, the coolies were arrested and taken to the Police Station, but were apparently discharged without any charge being entered against them. The Plaintiff, however, was arrested and there was a case against him in the Police Court; the Plaintiff was apparently discharged on the 26th of June, 1933, when some, at any rate, of the Plaintiff's coolies appear to have returned to the estate, they say as Defendant's coolies: Defendant says they returned as the Plaintiff's coolies. Tapping was then resumed and continued until the 31st of July, 1933. The parties are not in agreement on the question of on whose behalf, or at whose direction, this tapping was done; but as the Defendant has sold the rubber alleged to have been collected during that period and after deducting expenses has credited the amount of profit to the Plaintiff, I do not think that this question is really material unless it can be shewn that during that period the Defendant collected much less rubber than he might reasonably have been expected to collect or except as to the question of whether during that period there was excessive tapping as a result of which the trees were damaged. It is admitted by the Defendant that as from the 12th of July to the 31st of July, 1933, the coolies were in his employ. They were paid off on the 31st of July, 1933, and no further tapping of these trees appears to have taken place until about the 10th of October, 1933, when possession of the land was taken by a person to whom the Plaintiff had sold it.

The Plaintiff brings this action to recover damages on various grounds.

The first ground given in the plaint is that the Defendant without notice wrongfully took possession of the said land and prevented the Plaintiff's coolies from working on the said land, and under this heading the sum of $200.00 is claimed by way of damages. It is not contended that the Defendant had not a proper authority authorising him to enter into possession and receive the profits, but it is contended that the method in which he exercised this authority was wrongful; and it is urged that where a chargee enters into possession of land such as this, which is being run as a going concern, he must either take over the land as such a going concern, or give the chargor sufficient notice to enable him to wind up the going concern without unreasonable loss, and that in this case particularly there was no reason why the Defendant, if he did not wish to take over the estate as a going concern, should not have given the chargor (Plaintiff) reasonable notice, because it was not until more than 5 months after he has obtained the authority that he proceeded to enforce it. On behalf of the Defendant it is urged that this is to read into the section something which is not there. Section 137 provides no machinery for the enforcing of the right which it confers nor does it provide for the suspension of the powers and remedies of the chargor as is provided in section 136 where the chargee decides to receive the rents of the charged land. In my

opinion the contention of the Plaintiff is not inconsistent with the provisions of the section which authorises him to receive the profits; and to hold otherwise might lead to grave hardship and injustice, because if a chargee could enter on an estate where a large labour force is employed, without reasonable notice, and evict the chargor's manager and the whole of his labour force, the chargor might find himself liable to pay a very large sum of money to his employees in lieu of notice. On these grounds I think that the Defendant's conduct was wrongful in this sense: I do not think that his entry was wrongful, but I consider that in failing either to take over the estate as a going concern or to give the Plaintiff reasonable notice, he acted wrongfully and is liable for the damage which flowed from that wrongful action. The Plaintiff says that he was at that time employing 7 coolies and that he had to pay them $18.00 each in lieu of a month's notice. . . . . I think that they were the servants of the Plaintiff, and not as contended by the Defendant, independent contractors and that they were entitled to a month's notice or a month's salary in lieu thereof .....The evidence of the Plaintiff himself and those of his coolies who were called, is that the amount due was $18.00 per head and that this was actually paid to them. No evidence was called on behalf of the Defendant to rebut this. It seems to me to be a reasonable sum, and I find that the Plaintiff under this heading is entitled to recover the sum of $126.00

The second ground on which the Plaintiff claims damages is set out in paragraph 5 of the plaint as follows:—

> "The Defendant since the last said date (that is the 25th of May, 1933) has remained in possession of the said land and has enjoyed the profits thereof and has prevented the Plaintiff from so doing and the Plaintiff has thereby suffered damage."

This claim as worded is not very easy to understand. The Defendant was clearly entitled to remain in possession of the said land and to receive the profits; and that being so, he must, I think, be also entitled to prevent the Plaintiff from so doing; and I am unable to understand on what grounds the Plaintiff claims to be entitled to damages on this part of his claim.

Paragraph 6 of the Plaintiff's plaint reads as follows:—

> 'During his possession of the land the Defendant has caused it to be cultivated and the rubber trees thereon tapped in an unskilful and unhusbandlike manner and particularly has caused the rubber trees at times to be excessively tapped in many instances by having two cuts made upon them; at other times the Defendant has failed either to cultivate the said land or to obtain a reasonable and proper revenue from it; whereby the Plaintiff has suffered damage."

This part of the claim claims damages on two distinct grounds. The first ground is that the Defendant while in possession committed waste, and I will deal with that part of the claim first. The evidence shows clearly that prior to the Defendant's occupation the Plaintiff had himself been tapping the trees in an unskilful manner and not in accordance with the dictates of good husbandry. The evidence of the Settlement Officer Ishak shows that in the early part of December, 1932, the majority of the trees had two simultaneous cuts: and it is agreed by both sides and shewn by the evidence both of Mr. Cook and Mr. Waterfield that such tapping is unskilful and not in accordance with good husbandry. Whether this unskilful tapping continued up to the date of the Defendant's occupation is not clear; but even if it did, this would not be a justification for the Defendant to continue to tap in such a matter, inasmuch as this particular feature of the Plaintiff's management of the estate appears to have been one of the grounds on which the Defendant obtained his certificate from the Collector. The Plaintiff called 3 witnesses who stated that during the month of July, 1933, they were employed by the Defendant to tap the rubber trees and that during that period they employed two simultaneous cuts on one tree by the order of the Defendant. That there were two such cuts is, I think, borne out by the evidence of Mr. Cook who visited the land on the 14th of September, 1933. The Defendant's mandore also says that during this period two cuts were being made; but he says that they were made by the coolies inspite of the Defendant's order not to do so; that as they or some of them, were coolies who had formerly worked for the Plaintiff, they insisted on carrying on in the same manner as they had done for the Plaintiff; that he was unable to prevent them doing so; and that for that reason they were paid off at the end of July, 1933. I am satisfied that during the whole of the month of July, the coolies employed on the estate were in fact the servants of the Defendant, and I think he must be held responsible for the damage which his servants did, even although they did it contrary to his instructions. There was no reason why he should not have dismissed them summarily if they continued to disobey his orders, and if he continued to allow them to work under these circumstances, I think he must be held to be liable for any damage that was caused. At the same time, in view of the excessive overtapping which had been resorted to during the

whole of the time that the Plaintiff was in occupation, it is difficult to believe that similar overtapping carried on over a period of one month only can have damaged the estate very seriously. . . . . There is no other evidence before me to shew that the damage caused by the overtapping in July, 1933, amounted to anything like $28.00. I have no satisfactory evidence by which I can gauge the amount of damage done during July, 1933, and I therefore award the Plaintiff a nominal sum only which I assess at $10.00.

The second part of the claim in paragraph 6 is that after the defendant went into possession he failed to cultivate the land at all for the period from the 1st of August to the 10th of October, 1933, that no tapping was done, that it was the duty of the Defendant to cultivate the land in a reasonable way, and that he is liable to the Plaintiff for the profits which would have been made had he done so. It is urged that the chargee in possession in this country is in this respect in the same position as a mortgagee in possession in England. In volume II of Coote's Law of Mortgages, 7th edition, at page 820, it is stated that—

> "A mortgagee by entering into possession incurs serious responsibilities. He must be reasonably diligent in getting in the rents and profits, and he will be held strictly accountable to the mortgagor and those claiming under him for all rents and profits actually received, or which, but for his default, might have been received, by the mortgagee after deducting what is due to him under his mortgage, including all just and proper costs and allowances.
>
> "A mortgagee in possession is charged with the rents and profits which, but for his default, he might have received, because he has chosen to change his character of mere mortgagee and for the time being to become owner."

See *Eyre* v. *Hughes*, 2 Ch. D. 148 at p. 162. I do not think that it was seriously contended by the Defendant that this principle should not also be applied here. But the defence was that the reason why the Defendant failed to cultivate the land from the 1st of August to the 10th of October, 1933, was because of the obstructive tactics pursued by the Plaintiff who, it is suggested, adopted the attitude of "If I can't tap this rubber you shan't either." In regard to this defence, it is not pleaded, nor were any of the Plaintiff's witnesses cross-examined to it. Nor do I think that the Defendant has in fact succeeded in establishing it.....I therefore find that the Defendant did not in fact cultivate this property after the 21st of May, 1933, nor did he in fact in any way control it, and that he thereby committed a breach of his duty and I consider that that breach was aggravated by the fact that although he abandoned cultivation and control, he appears not to have given the Plaintiff any notice of his intention in this respect. I hold that the Defendant is therefore liable to account to the Plaintiff for the profits which, by exercise of reasonable diligence in cultivating the land, he might have made during the period from the 31st of July to the 10th of October, 1933. The parties appear to me not to be well-to-do and I am reluctant to inflict upon them the further expense of an account. I therefore propose to accept the evidence of Mr. Cook that with rubber at $13.00 per picul, a reasonable profit from an estate of this kind would be about $70.00 a month. The average price which the Defendant would be able to obtain during the period from the 25th of May to the 10th October, 1933 would appear to be about $13.00 per picul. I accept Mr. Wright's calculations that at this price the total profit for the period in question would amount to $312.21, but there falls to be deducted from this sum the profit which the Defendant admits having made and which he says has been credited to the Plaintiff's account amounting to $52.12, that is, half the amounts shown on Exhibits "G" and "I," leaving a balance of $260.09 at which sum I assess the damages under this heading. The Plaintiff will be entitled to be credited with the sum of $52.12 in his account under the charge.

The last item for which the Plaintiff claims damages was loss of latex cups and hangers, but this claim was abandoned during the trial.

The total result is that there will be judgment for the Plaintiff for the sum of $396.09

This sum being one which could have been recovered in the Court of a Magistrate, the Plaintiff would ordinarily be entitled to no more costs than he would have been entitled to if the proceedings had been brought in the Court of a Magistrate (Rule Committee [Supreme Court] Enactment, 1930, 1932 Rule No. 4, Sub-rule 13); but the case involved a difficult question of law in regard to the construction of section 137 of the Land Code, and in my opinion for that reason there was sufficient reason for bringing the suit in the Supreme Court, and I allow the Plaintiff his costs on the lower scale of costs in the Supreme Court. As, however, he has succeeded in only 3 of his 5 grounds, I order that the bill be taxed by the Registrar and that three-fifths only of such bill be alllowed to the plaintiff. This order as to costs is made subject to any argument which may be addressed to me after delivery of judgment.

The Defendant will be allowed to set off the amount found due by him on the decree and for costs against the amount due to him by the Plaintiff on the charge.

Judgment accordingly.